Lee Heng Moy (by Lee Heng Yau as holder of valid power of attorney for the plaintiff) (suing in person and for his children, who are minors, Tan Chee Chin, Tan Ee Ling(f), Tan Ping Quen and Tan Ping Ren) v Christopher Wong Wai Yee (as partner of the law firm practising under the style and name of Messrs Wong & Associates, the law firm representing the first, second, third, fourth, fifth and seventh defendants) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–774 OF 2008
ABDUL MALIK ISHAK, SULONG MATJERAIE AND RAMLY ALI JJCA
2 FEBRUARY 2011

Civil Procedure — Contempt of court — Committal proceedings — Motion for committal fixed for hearing five months and 17 days after leave obtained — Whether O 52 r 3(2) of the Rules of High Court 1980 breached — Whether lapse of leave mandatory — Whether breach curable

After obtaining leave under O 52 r 2(2) of the Rules of the High Court 1980 ('RHC') on 2 October 2007, the appellant filed a notice of motion ('encl 54') to commit the first and second respondents for contempt. The two were partners in a law firm that represented the third to the eighth respondents. Enclosure 54 was fixed for hearing on 19 March 2008. At the hearing, the respondents raised a preliminary objection that the appellant had breached O 52 r 3(2) of the RHC in that encl 54 was not entered for hearing within 14 days of the leave being obtained and, thus, the leave for the motion had lapsed. The court agreed with the objection and dismissed encl 54 with costs. Against that decision the appellant appealed to the Court of Appeal. At the outset of the appeal hearing, the court was informed of the first respondent's death on 8 February 2007. Consequently, the appeal against the first respondent was struck out with no order as to costs.

Held, dismissing the appeal with costs, affirming the decision of the High Court and striking out the appeal against the first respondent with no order as to costs:

(1) Procedural rules governing committal proceedings must be strictly adhered to as the liberty of the individual was at stake. The appellant had seriously breached O 52 r 3(2) of the RHC and the respondents were prejudiced by such breach (see paras 12 & 22).

(2) Here, leave was obtained on 2 October 2007. Enclosure 54 was filed 21 days later, on 23 October 2007, and heard on 19 March 2008, five months and 17 days after the leave was obtained. To strictly comply with O 52 r 3(2) it should have been entered for hearing on 16 October 2007. To aggravate the matter further, there was no application by the appellant for an extension of time (see paras 15 & 17).

(3) Order 52 r 3(2) used the phrase 'shall lapse'. It meant mandatory and admitted of no discretion (see para 19).

(4) Order 1A of the RHC could not be applied to all cases. The facts must be the guiding force in determining the applicability of O 1A. Here, an alleged contemnor's liberty was the crucial factor that demanded rigid adherence to the rules. Non-compliance with the rules had occasioned a substantial miscarriage of justice as envisaged in O 2 r 3 of the RHC. It was not curable under O 1A or O 2 r 1 or even O 92 r 4 of the RHC (see paras 24 & 26).

[Bahasa Malaysia summary

Selepas memperolehi kebenaran di bawah A 52 k 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') pada 2 Oktober 2007, perayu memfailkan notis usul ('lampiran 54') untuk mendakwa responden-responden pertama dan kedua untuk penghinaan. Kedua-dua mereka adalah rakan kongsi dalam firma undang-undang yang mewakili responden-responden ketiga dan kelapan. Lampiran 54 ditetapkan untuk pendengaran pada 19 Mac 2008. Pada masa pendengaran, responden-responden membangkitkan bantahan awal bahawa perayu telah memungkiri A 52 k 3(2) KMT di mana lampiran 54 tidak dimasukkan untuk pendengaran dalam masa 14 hari selaps kebenaran diperolehi dan, oleh itu, kebenaran untuk usul telah luput. Mahkamah bersetuju dengan bantahan tersebut dan menolak lampiran 54 dengan kos. Perayu merayu kepada Mahkamah Rayuan terhadap keputusan tersebut. Pada permulaan pendengaran rayuan, mahkamah telah diberitahu mengenai kematian responden pada 8 Februari 2007. Akibatnya, rayuan terhadap responden pertama dibatalkan tanpa perintah terhadap kos.

Diputuskan, menolak rayuan dengan kos, mengesahkan keputusan Mahkamah Tinggi dan membatalkan rayuan terhadap responden pertama tanpa perintah terhadap kos:

(1) Peraturan-peraturan prosedur yang mengawal prosiding komital mesti dipatuhi secara ketat memandangkan kebebasan individu menghadapi risiko. Perayu telah secara serius memungkiri A 52 k 3(2) KMT dan responden-responden diprejudis oleh kemungkiran sedemikian (lihat perenggan 12 & 22).

(2) Di sini, kebenaran diperolehi pada 2 Oktober 2007. Lampiran 54 difailkan 21 kemudiannya, pada 23 Oktober 2007, dan didengari pada

19 Mac 2008, lima bulan dan 17 hari selepas kebenaran diperolehi. Untuk mematuhi secara ketat dengan A 52 k 3(2) ia patut dimasuki untuk pendengaran pada 16 Oktober 2007 untuk menjadikan perkara tersebut bertambah teruk, tidak terdapat permohonan oleh perayu untuk pelanjutan masa (lihat perenggan 17 & 15).

(3) Aturan 52 k 3(2) menggunakan frasa 'shall lapse'. Ia bermaksud mandatori dan bermaksud tiada budi bicara (lihat perenggan 19).

(4) Aturan 1A KMT tidak dapat digunakan kepada kesemua kes. Fakta mesti menjadi kekuatan membimbing dalam menentukan keterterapan A 1A. Di sini, kebebasan penghina mahkamah yang didakwa adalah faktor penting yang memerlukan kepatuhan tegar terhadap peraturan-peraturan. Ketidakpatuhan dengan peraturan-peraturan telah menyebabkan ketidakadilan yang substansial seperti yang ditetapkan di dalam A 2 k 3 KMT. Ia tidak boleh dibetulkan di bawah A 1A atau A 2 k 1 atau sekalipun A 92 k 4 KMT (lihat perenggan 24 & 26).]

Notes

For cases on commital proceedings, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1931–1962.

Cases referred to

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287, HC (refd)

Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors [1986] 2 MLJ 193, SC (refd)

Bramblevale Ltd, Re [1970] 1 Ch 128, CA (refd)

Con-Mech Ltd v Amalgamated Union of Engineering Workers [1973] ICR 620 (refd)

Dupont Steels Ltd & Ors v Sirs & Ors [1980] 1 All ER 529 (refd)

Helen Yeap Poh Sim & Yang Lain lwn Universal Trustee (Malaysia) Bhd [2001] 7 CLJ 414, HC (refd)

Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v Md Jaafar bin Abdul Carrim & Anor [1998] 2 MLJ 244, HC (refd)

King, The v The Council of the Metropolitan Borough of Poplar, ex parte The London County Council, Same v Same, Ex parte The Managers of the Metropolitan Asylum District (No 2) [1922] 1 KB 95, CA (refd)

Knight And Another v Clifton And Others [1971] Ch 700; [1971] 2 All ER 378, CA (refd)

Lembaga Tabung Haji v Metrowangsa Asset Management Sdn Bhd & Anor [2003] 1 AMR 303, HC (refd)

Loh Eng Leong & 2 Ors v Lo Mu Sen & Sons (Sdn) Bhd & 2 Ors [2003] 1 AMR 206, HC (refd)

P A Thomas & Co And Others v Mould And Others [1968] 2 QB 913; [1968] 1 All ER 963 (refd)

Queen, The v Forbes And Another, Ex Parte Bevan And Others, The Queen v Drinkwater And Another, Ex Parte Heffernan And Others (1972) 127 CLR 1 (refd)
Syarikat M Mohamed v Mahindapal Singh & Ors [1991] 2 MLJ 112, HC (refd)
Sussex Peerage Case, The (1844) 11 Cl & Fin 85, HL (refd)

Legislation referred to

Rules of the High Court 1980 O 1A, O 2 r 1, O 2 r 3, O 52 r 2, O 52 r 2(2), O 52 r 3(2), O 52 r 3(4), O 92 r 4

Appeal from: Suit No MT1–22–164 of 2005 (High Court, Shah Alam)

Appellant in person.
Ng Cheng Keat (Wong & Associates) for the respondents.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] From the bar, learned counsel by the name of Mr Ng Cheng Keat — the second respondent in this appeal, drew our attention to the demise of Mr Christopher Wong Wai Yee — the first respondent in this appeal on 8 February 2007. And since this appeal centred on the issue of contempt, Mr Ng Cheng Keat submitted that it would be appropriate to strike out the appeal against the first respondent forthwith. Without further ado, we struck out the appeal of the appellant against the first respondent with no order as to costs.

[2] We then proceeded to hear the appeal. As a matter of record, we have this to say. We conducted the appeal judiciously by allowing the appellant ample time to submit to her heart's content. We listened attentively to her oral submissions. We anxiously considered her written submissions and the authorities submitted by her. We advised her not to submit off tangent and also the need to submit within the scope of her notice of appeal.

THE FACTS

[3] Within a short compass, the facts may be stated as follows. On 2 October 2007, the appellant obtained through her application in encl 49 leave from the High Court at Shah Alam under O 52 r 2(2) of the Rules of the High Court 1980 ('RHC') to commit Mr Christopher Wong Wai Yee and Mr Ng Cheng Keat as partners of the firm known as Tetuan Wong & Associates, a firm of advocates and solicitors, that represented defendants one, two, three, four, five and seven.

[4] The appellant then sought by way of an application in encl 54 via a notice of motion to commit Mr Christopher Wong Wai Yee and Mr Ng Cheng Keat — two practising advocates and solicitors, for contempt and that they be imprisoned or fined or both.

[5] Before the learned High Court judge, the respondents raised a simple preliminary objection. It was worded in this way. That since the notice of motion in encl 54 was dated and filed on 23 October 2007 and it was heard on 19 March 2008, there was a breach of O 52 r 3(2) of the RHC which stipulates that unless within 14 days after leave is granted the motion in encl 54 is entered for hearing then the leave that was obtained shall lapse.

[6] The learned High Court judge agreed with the preliminary objection advanced by the respondents and Her Ladyship dismissed encl 54 with costs. Aggrieved, the appellant appealed to this court.

ANALYSIS

[7] The inherent contempt jurisdiction of the court can never be doubted. The power vested in the court to punish contempt is not derived from statute or from the common law. That power is ingrained in the court by virtue of it being a court of law. It is as simple as that.

[8] The RHC should not restrict or abrogate the contempt power inherent in the court. And the absence of a rule of procedure is not fatal to a contempt action (*Con-Mech Ltd v Amalgamated Union of Engineering Workers* [1973] ICR 620 at p 626).

[9] Menzies J said in *The Queen v Forbes And Another, Ex Parte Bevan And Others, The Queen v Drinkwater And Another, Ex Parte Heffernan And Others* (1972) 127 CLR 1, at p 7, that, 'Inherent jurisdiction' is the power which a court has simply because it is a court of a particular description. Thus the courts of common law without the aid of any authorising provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt'.

[10] Having established that the court has the inherent contempt jurisdiction, it is appropriate to say that a contemnor who is in contempt of court may be imprisoned or fined or both. It carries penal consequences. The liberty of the contemnor may be curtailed. In the words of O'Connor J in *PA Thomas & Co And Others v Mould And Others* [1968] 2 QB 913 at p 923; [1968] 1 All ER 963 at p 967:

> ... where parties seek to invoke the power of the court to commit people to prison and deprive them of their liberty, there has got to be quite clear certainty about it.

[11] By virtue of encl 54, the appellant wants to commit two practising advocates and solicitors for contempt by incarcerating them in prison or fining them or both. It is not an application that can be taken lightly. In the words of Lord Denning MR in *In re Bramblevale Ltd* [1970] 1 Ch 128 at p 137:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt.

[12] It is our judgment that the procedural rules governing committal proceedings must be strictly adhred to. This brings to the forefront O 52 r 2 of the RHC. It reads as follows:

> 2 Application to court (O 52 r 2)
>
> (1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.
>
> (2) An application for such leave must be made ex parte to the Court, except in vacation when it may be made to a Judge in Chambers, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

[13] Thus, leave of court to issue committal proceedings against any person must be obtained. And the application must be made ex parte and a supporting statement together with the affidavit verifying the facts relied upon must be filed. It is imperative that the supporting statement should set out the name and description of the applicant as well as the name, description and address of the person sought to be committed together with the grounds thereto. There must be strict compliance with O 52 r 2(2) of the RHC (*Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v Md Jaafar bin Abdul Carrim & Anor* [1998] 2 MLJ 244; *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd. & Ors* [1986] 2 MLJ 193 (SC); *Syarikat M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112; *Helen Yeap Poh Sim & Yang Lain lwn Universal Trustee (Malaysia) Bhd* [2001] 7 CLJ 414; and *Lembaga Tabung Haji v Metrowangsa Asset Management Sdn Bhd & Anor* [2003] 1 AMR 303).

[14] Here, leave was obtained by the appellant. But, learned counsel for the respondents argued that the leave that was granted by the High Court at Shah Alam had lapsed because encl 54 was entered for hearing late in the day. It is now ideal to refer to O 52 r 3 of the RHC. It reads as follows:

A 3 Application for order after leave to apply granted (O 52 r 3)

(1) When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to the Court and, unless the Court or Judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein
B for the hearing.

(2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.

(3) Subject to paragraph (4), the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must
C be served personally on the person sought to be committed.

(4) Without prejudice to the powers of the Court or Judge under O 62 r 5, the Court or Judge may dispense with service of the notice of motion under this rule if it or he thinks it just to do so.

D

[15] Since leave was obtained by the appellant pursuant to O 52 r 2 of the RHC, encl 54 should have been entered for hearing on 16 October 2007 and not on 19 March 2008 so that it would strictly comply with O 52 r 3(2) of the RHC. It is ideal to recall to mind the case of *Syarikat M Mohamed v*
E *Mahindapal Singh & Ors* where KC Vohrah J (later JCA) aptly said at p 114:

> ... that since committal proceedings are quasi-criminal proceedings and the liberty of the subject is involved, the procedural rules applicable must be strictly enforced.

F

[16] Now, after leave has been obtained pursuant to O 52 r 2 of the RHC, the applicant must expeditiously file the notice of motion together with the statement and affidavit and serve them on the person sought to be committed. According to O 52 r 3(1) of the RHC there must be at least eight clear days between the service of the notice of motion and the day named therein for the
G hearing. And within a span of 14 days after the leave was granted, the applicant must make sure that the motion is entered for hearing otherwise the leave that was obtained shall lapse.

H **[17]** Here, leave was obtained on 2 October 2007. The notice of motion was dated and filed on 23 October 2007. There was already a delay of 21 days. And the notice of motion was heard on 19 March 2008. A further delay of five months 17 days occurred (calculated from 2 October 2007 to 19 March 2008). To aggravate the matter further there was no application for an extension of
I time filed by the appellant at all. Even the learned High Court judge did not resort to invoke O 52 r 3(4) of the RHC to assist the appellant and we saw no reason to disagree with Her Ladyship.

[18] It must be emphasised that the notice of motion is a very important legal document after the leave was obtained. That notice of motion accompanied by the statement must set out the name, description and address of the person to be committed and the grounds on which his committal is being sought. It must also be accompanied by an affidavit. Together the notice of motion, the statement and the affidavit must be served personally on the person that is sought to be committed. There must be personal service (*The King v The Council of the Metropolitan Borough of Poplar, Ex parte The London County Council, Same v Same, ex parte The Managers of the Metropolitan Asylum District (No 2)* [1922] 1 KB 95 (CA)). With the death of Mr Christopher Wong Wai Yee, the appeal against him was struck out because the alleged contemnor had died.

[19] Expediency is the order of the day. Order 52 r 3(2) of the RHC talks about lapsing of the leave if the notice of motion is not set for hearing within 14 days after the leave was obtained. It uses the phrase 'shall lapse'. The usage of the word 'shall' admits of no discretion. It means that it is mandatory. Tindal CJ in the *The Sussex Peerage Case* (1844) 11 Cl & Fin 85 at p 143 said:

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.

[20] Lord Scarman in *Dupont Steels Ltd & Ors v Sirs & Ors* [1980] 1 All ER 529 at p 551 said that:

> ... the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires.

[21] We will apply the law as set out in O 52 r 3(2) of the RHC no matter how 'unpalatable' that may be (to borrow the speech of Lord Scarman in *Dupont Steels Ltd & Ors v Sirs & Ors*). And when so applied, it will be held to the disadvantage of the appellant.

[22] It is our judgment that the appellant has seriously breached O 52 r 3(2) of the RHC and the respondents were prejudiced by such breach bearing in mind that in a contempt proceeding the liberty of the individual is at stake. The argument that the appellant merely delayed for eight days cannot be accepted and must be rejected forthwith. When the liberty of an individual is at stake in the context of an application for committal, a delay of even one day is fatal.

[23] The memorandum of appeal averred that the learned High Court judge erred in law and in fact when Her Ladyship failed to consider and apply O 1A of the RHC in favour of the appellant. That O 1A of the RHC is worded in this way:

ORDER 1A

COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE

In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

[24] We are of the view that O 1A of the RHC cannot be applied to all cases. In the context of the present case, the facts must surely be the guiding force in determining the applicability of O 1A of the RHC. We have set out the rigours of the contempt law. A contemnor's liberty would be a crucial factor that demands a rigid adherence to the rules. We are not so besotted by the rules and our sense of justice and fairness are not compromised. Since the appellant wants to commit the two advocates and solicitors, she must strictly comply with O 52 r 3(2) of the RHC. There are no two ways about it.

[25] Russell LJ in *Knight And Another v Clifton And Others* [1971] Ch 700 (CA) at p 707; [1971] 2 All ER 378 (CA) at p 381 aptly said that:

> Contempt of court, even of the type that consists in breach of an injunction or undertaking, is something that may carry penal consequences, even loss of liberty, and the evidence required to establish it must be appropriately cogent.

[26] The justice of the case demands that we construe O 52 r 3(2) of the RHC strictly. It is our judgment that the non-compliance with the rules has occasioned a substantial miscarriage of justice as envisaged in O 2 r 3 of the RHC. And it is also not curable under the provisions of O 1A and O 2 r 1 of the RHC. Even O 92 r 4 of the RHC cannot be used indiscriminately nor applied as a matter of course (*Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287; and *Loh Eng Leong & 2 Ors v Lo Mu Sen & Sons (Sdn) Bhd & 2 Ors* [2003] 1 AMR 206) to assist the appellant. It must be borne in mind that we are dealing with a contempt motion and strict adherence to the rules must be observed.

[27] For these varied reasons, we unanimously dismissed the appellant's appeal with costs of RM10,000. We affirmed the decision of the learned High Court judge. Deposit should rightly go to the respondents as part of the costs.

Appeal dismissed with costs, decision of the High Court affirmed and appeal against first respondent struck off with no order as to costs.

Reported by Ashok Kumar